

Office - Supreme Court, U.S.

FILED

OCT 10 1957

JOHN T. FEY, Clerk

LIBRARY

PETITIONER'S ~~REPLY~~ ^{REPLY} BRIEF TO RESPONDENT'S
SUPPLEMENTAL BRIEF ON REARGUMENT

IN THE
Supreme Court of the United States

OCTOBER TERM, 1957

No. 5

CHARLES ROWOLDT, *Petitioner*,

v.

J. D. PERFETTO, Acting Officer in Charge, Immigration
and Naturalization Service, Department of Jus-
tice, St. Paul, Minnesota.

On Writ of Certiorari to the United States Court of Appeals
for the Eighth Circuit

DAVID REIN

JOSEPH FORER

711 14th Street, N. W.
Washington, D. C.

Attorneys for Petitioner.

INDEX

	Page
I. Nominal Membership	1
II. The Act's Violation of Substantive Due Process ..	4

CASES CITED

Colyer v. Skeffington, 265 Fed. 17	3
Galvan v. Press, 347 U.S. 522	1, 2, 3
Schwartz v. Board of Bar Examiners, 353 U.S. 232	4, 5
Wieman v. Updegraff, 344 U.S. 183	4

IN THE
Supreme Court of the United States

OCTOBER TERM, 1957

No. 5

CHARLES ROWOLDT; *Petitioner,*

v.

J. D. PERFETTO, Acting Officer in Charge, Immigration
and Naturalization Service, Department of Jus-
tice, St. Paul, Minnesota.

On Writ of Certiorari to the United States Court of Appeals
for the Eighth Circuit

**PETITIONER'S REPLY BRIEF TO RESPONDENT'S
SUPPLEMENTAL BRIEF ON REARGUMENT**

I. Nominal Membership

The respondent argues at length (Supp. Br. 7-23) that *Galvan* was correct in interpreting the statute as not requiring knowledge of unlawful advocacy as a prerequisite for deportability. We did not dispute this aspect of the *Galvan* decision; on the contrary we stressed in our main brief (pp. 43, 64) that this was one of the features of the statute that rendered it unconstitutional. The government's treatment of the

issue, however, ignores the distinction made in *Galvan* between knowledge of unlawful advocacy, which *Galvan* held was not a prerequisite of deportability, and knowledge of the nature of the Communist Party as a distinct and active political organization, which it held was a prerequisite (at 528).

As indicated in *Galvan*, there is an area of membership, which is only nominal and does not fall within the scope of the statute. Although knowledge of unlawful advocacy is not necessary for this purpose, mere conscious or voluntary membership is not enough. One's membership may be conscious and voluntary, but still nominal.

The most illuminating gloss on the statute appears in the congressional debate on the 1951 clarifying amendment (see *Galvan* at 527.) Senator Ferguson, who offered the amendment which was finally adopted by the Senate, explained it as follows:

"... the amendment would exclude all those who were Communists by conviction, what we might call mentally Communists. But it would not exclude those who really, in effect, never have been what I call mentally Communist—those whose Communist affiliation was nominal or involuntary." (97 Cong. Rec. 2368.)

* * * * *

"When we change it here today we are not changing it as to people who were Fascists, Nazis, Communists, or totalitarians by virtue of their convictions and what I have referred to as their mental processes." We are changing it only as to those persons who never were mentally or psychologically Fascists, Nazis, Communists, or totalitarians of any stripe or any color." (97 Cong. Rec. 2387.)

As noted in *Galvan*, Congress considered that the most authoritative source for the meaning of the term membership as used in the statute could be found in the District Court decision in *Colyer v. Skeffington*, 265 Fed. 17. In addition to the portions of that decision quoted in *Galvan*, it is important to note that the court there set aside deportation orders against persons meeting the following description:

"Social, educational purposes, and race sympathy, rather than political agitation, constituted the controlling motive with a large share of them [i.e., aliens ordered deported on grounds of membership]. They joined the local Russian or Polish or Lithuanian Socialist or Communist club, just as citizens join neighborhood clubs, social or religious, or civic, or fraternal." (At 50.)

The court also stated in *Colyer* (at 72),

"Such a membership must be a real membership."

In *Colyer*, the Court also set aside deportation orders as being based on insufficient proof, where the evidence showed only that the alien had paid dues to the Communist Party for three months (see at p. 75), and in another case where the alien had joined the Communist Party because it offered him an opportunity to learn to read, write, and do arithmetic. This alien, according to the Court, had no interest in politics and so fell outside the scope of the statute (see at 74).

As we have shown in our main brief (pp. 21-23), under these standards, petitioner's membership in the Communist Party was of a nominal character.

II. The Act's Violation of Substantive Due Process

Schware v. Board of Bar Examiners, 353 U.S. 232, decided after we submitted our original brief, confirms our position that the due process clause prohibits deprivation of an important privilege because of the bare fact of past membership in the Communist Party. *Schware* holds that such membership does not without more justify an inference of presently bad character and is not a rational basis for determining that an individual is unfit to practice law. In addition, the government's extended, though unnecessary, demonstration that the deportation statute does not require scienter, supports our view that the statute collides with *Wieman v. Updegraff*, 344 U.S. 183, which holds that due process prohibits exclusion from governmental employment on account of organizational membership unaccompanied by personal knowledge of the group's claimed pernicious character.

Accordingly, if the privilege of residence is protected by the same due process principles as such less vital privileges as government employment and access to the professions, an alien may not constitutionally be expelled for reasons which have no rational relation to his desirability as a continued resident. Among such invalid reasons is past membership regardless of circumstances in the Communist Party. The government flies in the face of *Schware* and *Wieman* when it argues that the deportation statute represents a reasonable determination of an alien's undesirability because the Communist Party is, has been at every single moment in the past, and will always be, a bad organization.

The government contends, however, that exercise of the expulsion power, unlike the other powers of gov-

ernment, is not subject to judicial review because it is connected with foreign affairs.¹ The argument is made that it is a political question whether the United States should eliminate a possible "source of diplomatic complaint . . . by expelling the alien" (Supp. Br. 28.)

But this claimed political question is not involved here, because the particular legislation is not an exercise of any power to eliminate diplomatic complaints. Rather it is an exercise of the power to oust aliens considered to be presently undesirable residents for reasons having nothing to do with international responsibilities toward aliens. The considerations which led Congress to enact the statute are elaborately set out in the government's Supplemental Brief (pp. 40-66), and they amply demonstrate that the thought that aliens covered by the statute might be a source of diplomatic complaint played no part in that decision. The thesis there expounded is that an alien who ever was a member of the Communist Party regardless of the circumstances and the period and duration of membership, has abused our hospitality and is susceptible to reinfection by radical ideas. This is about the same view that was rejected in *Schwartz* as being "wholly unwarranted" (Frankfurter, J. concurring at 249).

¹ There is no substance to the government's other contention (Supp. Br. 39) that if deportation statutes are to be tested by due process standards, the degree of rationality which they must meet is much lower than in other cases. This Court does not set aside a statute as violative of due process unless it is based upon "a wholly arbitrary standard or on a consideration that offends the dictates of reason." (Frankfurter, J., concurring in *Schwartz* at 249). Surely there is no room for "lower" or "higher" standards in determining whether a statute is "wholly arbitrary."

It is important to remember that though the government throughout disingenuously assimilates expulsion and exclusion, the statute here involved is expulsion legislation. Moreover, the expulsion is decreed for conduct which occurred in this country. Nor does it draw any distinction along nationality lines. Accordingly, the statute has no significant connection with eliminating possible diplomatic complaints or other aspects of our foreign relations. If Congress had been acting to remove the source of foreign complaints concerning the treatment of aliens, it would have required the deportation of all aliens, or aliens of particular nationality, or aliens whose conduct was genuinely related to the creation of international incidents.

There is no more reason, therefore, why this legislative determination of who constitutes undesirable residents should be insulated from judicial review than a determination of who constitutes undesirable government employees. Indeed, the latter determination is more directly connected with the administration of governmental affairs and should, if anything, have more leeway than the former.

Respectfully submitted,

DAVID REIN

JOSEPH FORER

711 14th Street, N. W.
Washington, D. C.

Attorneys for Petitioner.